No. 80-918

JAN 13 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALLEN R. TRUE AND CYNTHIA F. TRUE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Ceco Steel Products Corp. v. *Commissioner*, 150 F. 2d 698 2

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 ... 3

Commissioner v. *S. Frieder & Sons Co.*, 228 F. 2d 478 2

Commissioner v. *Smith Paper*, 222 F. 2d 126 ..... 2, 3

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 4

Handshoe v. *Commissioner*, 252 F. 2d 328 2

Hatten v. *Commissioner*, cert. denied, No. 80-690 (Jan. 12, 1981) 1

Kiker v. *Commissioner*, 218 F. 2d 389 2

Licavoli v. *Commissioner*, 318 F. 2d 281 ..... 2, 3

Louisville Builders Supply Co. v. *Commissioner*, 294 F. 2d 333 3

Michael v. *Commissioner*, 56 F. 2d 825 ..... 2, 3

Porter v. *Commissioner*, 453 F. 2d 1231 2

Ryan v. *Commissioner*, 517 F. 2d 13, cert. denied, 423 U.S. 892 2

Wilson v. *Commissioner*, 564 F. 2d 1317 2

W.W. Windle Co. v. *Commissioner*, 550 F. 2d 43, cert. denied, 431 U.S. 966 3

Page

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):

26 U.S.C. 7428 2
26 U.S.C. 7428(a) 2
26 U.S.C. 7459(c) 1
26 U.S.C. 7459(d) 2
26 U.S.C. 7459(e) 2
26 U.S.C. 7476 2
26 U.S.C. 7476(a) 2
26 U.S.C. 7477 2
26 U.S.C. 7477(a) 2
26 U.S.C. (Supp. II) 7478 2
26 U.S.C. (Supp. II) 7478(a) 2
26 U.S.C. 26 U.S.C. 7482(a) 1, 2, 3
28 U.S.C. 1291 3

Miscellaneous:

9 J. Mertens, *Law of Federal Income Taxation* (1977) 3

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Petitioners seek review of an order of the United States Tax Court consolidating their case for trial with the cases of other similarly situated participants in the transaction giving rise to one of the issues in litigation. The court of appeals dismissed their appeal for lack of jurisdiction. The same issue is presented in *Hatten* v. *Commissioner*, cert. denied, No. 80-690 (Jan. 12, 1981).

The court of appeals correctly dismissed petitioners' appeal. The jurisdiction of the courts of appeals to review actions of the Tax Court is strictly limited by statute. Section 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.) grants to the courts of appeals jurisdiction "to review the decisions of the Tax Court," and Section 7459(c) (26 U.S.C.) establishes the content of the term "decision" as "an order specifying the amount of the deficiency." As the Second Circuit held almost 50 years ago in *Michael* v.

Commissioner, 56 F. 2d 825 (1932), under parallel provisions then relating to the Board of Tax Appeals, the court of appeals have jurisdiction to review only such "decisions" of the Tax Court (then the Board of Tax Appeals), and not intermediate or interlocutory orders.[1]

Contrary to petitioners' contention (Pet. 14-15), the courts of appeals have uniformly followed *Michael,* and have held that the courts of appeals have jurisdiction to review on appeal only those "decisions" of the Tax Court (or its statutory predecessor, the Board of Tax Appeals) that determine the amount of a deficiency, or that, by statute, are considered to be such decisions. *Wilson* v. *Commissioner,* 564 F. 2d 1317, 1318 (9th Cir. 1977). See also *Ceco Steel Products Corp.* v. *Commissioner,* 150 F. 2d 698 (8th Cir. 1945); *Kiker* v. *Commissioner,* 218 F. 2d 389 (4th Cir. 1955); *Commissioner* v. *Smith Paper,* 222 F. 2d 126 (1st Cir. 1955); *Commissioner* v. *S. Frieder & Sons Co.,* 228 F. 2d 478 (3d Cir. 1955); *Handshoe* v. *Commissioner,* 252 F. 2d 328 (4th Cir. 1958); *Licavoli* v. *Commissioner,* 318 F. 2d 281 (6th Cir. 1963); *Porter* v. *Commissioner,* 453 F. 2d 1231 (5th Cir. 1972); *Ryan* v. *Commissioner,* 517 F. 2d 13 (7th Cir.), cert. denied, 423 U.S. 892 (1975);

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[1]The 1954 Code expressly assimilates certain other dispositions of proceedings by the Tax Court as "decisions" for purposes of Section 7482(a). Section 7459(d) provides that a decision dismissing a proceeding shall be considered a decision that the deficiency is the amount determined by the Secretary, and Section 7459(e) provides that if assessment or collection is barred by the statute of limitations, a decision of the Tax Court to that effect shall be considered a decision that there is no deficiency. More recently, when the Tax Court was given limited jurisdiction to make declarations with respect to charitable organizations (Section 7428), certain retirement plans (Section 7476), transfers of property from the United States (Section 7477), and the status of certain governmental obligations (Section 7478 (Supp. II)), Congress has carefully provided that such a declaration shall have the force and effect of a decision of the Tax Court, "and shall be reviewable as such." See Sections 7428(a), 7476(a), 7477(a), and 7478(a) (Supp. II).

W. W. Windle Co. v. *Commissioner,* 550 F. 2d 43, 45 (1st Cir.), cert. denied, 431 U.S. 966 (1977); 9 J. Mertens, *Law of Federal Income Taxation* § 51.13 (1977).[2] Since the consolidation order does not determine the amount of the deficiency, the court properly dismissed petitioners' appeal for lack of jurisdiction.

In seeking to avoid the limitations upon review of Tax Court orders other than decisions, petitioners attempt to invoke (Pet. 19-21) the "collateral order" doctrine of *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). *Cohen* and the "collateral order" doctrine have no relevance in this context. The question in *Cohen* related to the finality, for purposes of 28 U.S.C. 1291, of the order in question. But, as the court noted in *Michael* v. *Commissioner, supra,* 56 F. 2d at 826, the first question with respect to an appeal from an order of the Tax Court is whether the order under review is a "decision" of the Tax Court, not whether it is final. Here, the consolidation order was not a decision. Hence, appeal from that order is not within the jurisdiction conferred upon the courts of appeals by Section 7482(a) of the Code.

Even if the question in this case were confined to finality, the "collateral order" doctrine of *Cohen* would not support

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[2]The phrase in Section 7482(a) assimilating review of Tax Court decisions to review of district court decisions relates to scope of review, not to jurisdiction. *Commissioner* v. *Smith Paper, supra,* 222 F. 2d at 128.

Petitioners contend (Pet. 15) that *Louisville Builders Supply Co.* v. *Commissioner,* 294 F. 2d 333 (6th Cir. 1961), deviates from this consistent line of authority. But that case involved a special proceeding that the court of appeals held was beyond the jurisdiction of the Tax Court, and was therefore reviewable on that basis. In a subsequent case, the Sixth Circuit adhered to the well-settled line of authority limiting the jurisdiction of the courts of appeals to review decisions of the Tax Court. See *Licavoli* v. *Commissioner, supra,* 318 F. 2d at 281. See also *W. W. Windle Co.* v. *Commissioner, supra,* 550 F. 2d at 45, n. 1.

petitioners' appeal in this case. As the Court recently observed in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978):

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

While petitioners contend (Pet. 4-9) that they will suffer injury from the Tax Court's consolidation order, they are free to pursue an appeal from any decision of the Tax Court entered after trial.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

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[3]Contrary to petitioners' contention (Pet. 15-16), neither the Seventh Circuit (*Ryan* v. *Commissioner, supra*) the Sixth Circuit (*Licavoli* v. *Commissioner, supra*), the Tenth Circuit (*Hatten* v. *Commissioner, supra*), have applied the "collateral order" doctrine to orders of the Tax Court. While those courts have discussed the doctrine, none of them has found it to be applicable to orders of the Tax Court.